IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 990.

MORTON FRIEDMAN, *Petitioner,*

v.

LEWIS B. SCHWELLENBACH, ET AL., *Respondents.*

BRIEF OF UNITED PUBLIC WORKERS OF AMERICA (CIO) AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI.

The United Public Workers of America, CIO, is an organization a substantial part of the membership of which is employed by the federal government. The petitioner, Morton Friedman, was a member of the predecessor organization, the United Federal Workers of America, CIO, at the time of the events involved in these proceedings.

The dismissal of Morton Friedman from the federal service is one of many similar cases affecting federal employees, some of whom are members of the United Public

Workers. The Union has an interest in these cases because of the principles that they involve; because of their effect upon the individuals concerned; because of their tendency to demoralize and degrade the federal service; and because they are frequently a cloak for anti-union drives or for the effectuation of racial and religious prejudices.

The United Public Workers of America neither advocates nor approves depriving the Government of the United States of adequate machinery by which persons in the federal service intent upon subverting the Government of the United States may be discovered and discharged, nor does it advocate or approve depriving appointing agencies of the necessary managerial authority to perform this function.

But at the same time, it is the firm opinion of the Union that federal employees are entitled to the same scrupulous regard for their legal rights and civil liberties which the law accords to other citizens. They should not be subject to dismissal except in accordance with law and with orderly process designed to assure fair presentation of the facts and judicious determination of the issues.

The Friedman case and a number of other cases pending before governmental agencies do not involve dismissals as a result of the exercise of the managerial responsibility or discretion of the agency for which the employee works. They involve dismissals over the protest of such agency, in opposition to its judgment, and at the order of the Civil Service Commission acting as an inquisitorial agency. They do not involve dismissals within the principles established by the Congress, but ruthless discharges in violation thereof. They do not involve separations from the federal service on the basis of the evidence of those in a position to know the employee. They involve dismissal in direct contradiction to the judgment and testimony of those who are in a position to appraise the loyalty of the employee.

In the Friedman case, the War Manpower Commission dismissed Friedman at the direction of the Civil Service Commission and solely for the reason, as stated by the War Manpower Commission, that he was "found to be ineligible by the Civil Service Commission (letter of June 5, 1944)." (R. 17). The Commission's "finding" was based entirely upon its conclusion that Mr. Friedman was not eligible for retention in the service because the Commission entertained what is now characterized as a "reasonable doubt as to Mr. Friedman's loyalty." (R. 7-9).[1]

The United Public Workers of America urges this Court to accept jurisdiction in this case for the reasons stated herein and in the petition filed by Morton Friedman. We call the Court's attention to the fact that this suit does not have as its objective a ruling that would require the War Manpower Commission or its successor the Labor Department to retain Mr. Friedman indefinitely in its employ against its own judgment. In substance, the suit seeks (1) a ruling that Friedman's dismissal solely because of the finding of the Civil Service Commission that it entertained "a reasonable doubt as to his loyalty" was in violation of law; (2) a restoration of Mr. Friedman's status prior to the illegal direction of the Civil Service Commission; and (3) an injunction to prevent the Civil Service Commission from interfering with the War Manpower Commission's exercise of its own managerial discretion within the limits of law.

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[1] The Commission's final letter ordering dismissal merely stated that Friedman was ineligible "according to standards observed by the Commission." The standards were not specified. Its original letter ordering dismissal merely stated that the Commission "has reached the conclusion that the best interests of the Government would be served by terminating Mr. Friedman's employment" (R. 54). It was only in its answer in the instant case that the government raised the argument that the dismissal was pursuant to the Commission's regulation prescribing reasonable doubt as to loyalty as a ground for separation.

I.

The Importance of the Issue.

Morton Friedman was dismissed by order of the Civil Service Commission from the federal service on the grounds that there was "reasonable doubt as to his loyalty." The alleged doubt was not entertained by the War Manpower Commission or the Office for Emergency Management which had hired Mr. Friedman and for which he was working to their complete satisfaction. Nor had his loyalty been questioned by any previous employing agency of the government—which he had served for nine years. The doubt existed only in the minds of commissioners of the Civil Service Commission. The doubt did not exist even in the minds of the members of the Civil Service Commission's own Board of Appeals and Review, which recommended Mr. Friedman's exoneration.

According to the Civil Service Commission, the basis for its "reasonable doubt" was, first, that Mr. Friedman, like Chester Bowles[2] and thousands of other Americans, opposed participation by the United States in the last war until after the German invasion of the Soviet Union; and also because Mr. Friedman, like thousands of other Americans, joined the American Peace Mobilization which opposed American participation in the war.

Neither the basic nor the technical issues presented by this case have been passed upon by this Court. Technically, the issues involved are (1) construction of the applicable laws to determine whether the Civil Service Commission has jurisdiction to require an agency of Government,

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[2] See his statement (PM Sunday Magazine, October 20, 1946, p. 16):

> "Until 1941 I thought of it (Hitlerism) as a passing phase, a local middle-European phenomenon, a bad answer to prolonged economic misery. When Hitler invaded Russia, although I am certainly no Communist, I realized that here was proof that it was more than an ordinary clash of old-world powers."

against its will, to discharge an employee after nine years of service, on the ground that the Civil Service Commission has a "reasonable doubt as to his loyalty"; (2) if the Civil Service Commission has such jurisdiction, can it lawfully prescribe a standard as vague and general as the "reasonable doubt" test; and (3) is the "reasonable doubt" test invalid in view of its conflict with clear legislation of the Congress on the subject of the standard of loyalty of federal employees and with the constitutional guarantees of the First Amendment.

In broader perspective, the issues presented by the case of Morton Friedman raise questions of fundamental importance to the Government of the United States and to our democratic society. We believe that it is essential that this Court define the limits of jurisdiction and permissible action within which freedom of speech and thought may be curtailed in the real or supposed interests of governmental administration. This is important not merely because of the individuals involved, but fundamentally because the employees of the Government are a group of men and women who are vital to the well-being of this nation. If they can be dismissed on the basis of the personal predilection of a Commission by which they are not employed and the conduct of which is not regulated by any intelligible, objective standard, only persons who are thorough conformists with the prevailing views of the moment will accept or remain in Government employment. And those unfortunates who are in Government service under such conditions will live in constant terror lest a thought, an idea or belief creep into their minds which is not patterned upon the thoughts and prejudices of those who happen to be Civil Service Commissioners.

In addition, violations of the civil rights of its employees by the federal Government have a profound effect upon the nation as a whole. Witch hunts in the governmental offices of Washington, highly publicized as they are, are followed by witch hunts throughout the country from East

Coast to West. If the solemn processes of government are used to inspire and carry out the summary destruction of careers and reputations because a "reasonable doubt as to loyalty" exists in the minds of three officials, stubbornly opposed to the opinion of those who are intimately familiar with the person concerned, we can only expect that private persons in their private lives will be encouraged and heartened in a similar ruthless extirpation of individuals whose thoughts and beliefs happen to differ from those which are in vogue.

II.

The Basic Provisions of Law.

Federal employees are hired and discharged pursuant to express and detailed provisions of law. Friedman was a "war service" appointee. He could be separated from service by the War Manpower Commission whenever it chose, provided that in so doing it did not violate an express provision of law. But he could not be discharged by the Civil Service Commission at all, as we shall point out (pp. 13-14 *infra*). And he could not be discharged even by the War Manpower Commission (or any other agency or official) for reasons expressly prohibited by law. He could not, for example, be discharged for failure to make a political contribution (Civil Service Act, Section 2 Fifth, 5 USC § 633). And he could not be dismissed because he was a Negro, Jew, Catholic or Protestant (Executive Order No. 8587, November 7, 1940 CFR Cum. Supp. 1943, Book 2, p. 1439); or because he voted for Republican, Democratic, or Socialist candidates (Hatch Act, § 9(a), 18 USC § 61h). He could not be dismissed because of any expression of "opinions on all political subjects and candidates." (Hatch Act § 9(a), *supra*). He could not be dismissed for political affiliations "except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment." (Executive Order No. 8587, *supra*).

Congress has expressly provided, on the other hand, that any person shall immediately be removed from office if he has membership in "any political party or organization which advocates the overthrow of our constitutional form of government in the United States." (Hatch Act, §9A, 18 USC §61i). It has also provided in appropriation statutes that employees who advocate the overthrow of the Government or who belong to organizations advocating such overthrow, cannot be paid from federal funds. (See e.g. riders cited in note 2 of the opinion in *United States* v. *Lovett*, 66 Sup. Ct. 1073 at 1075).

It is not contended that Friedman was subject to these statutory disqualifications. He was dismissed under a "regulation" of the Civil Service Commission which provided that "a reasonable doubt as to his (an employee's) loyalty to the Government of the United States" . . . "shall be sufficient cause for removal from the service." (Civil Service Commission Departmental Circular No. 323, February 28, 1942).

As we discuss in the following points, the Commission had no authority to issue this regulation; even if it had authority, the regulation is too vague and general to be valid; and it is in conflict with constitutional and statutory provisions.

III.

ARGUMENT.

1. The Civil Service Commission Has No Jurisdiction to Require by Regulation the Dismissal of a Federal Employee on the Grounds that the Commission Has a "Reasonable Doubt as to (his) Loyalty."

(a) *The President Did Not and Could Not Delegate to the Civil Service Commission the Authority to Make this Regulation.*

The Civil Service Commission is an agency of limited authority. This authority is defined by statute and executive order.

The Commission's regulation in issue in this case was not promulgated pursuant to statute. It was announced "pursuant to the authority conferred by Executive Order 9063, of February 16, 1942, and 9067 of February 20, 1942." 7 F. R. 1075 No. 35 and 7 F. R. 1407 No. 38.

By the Executive Orders cited above the President did purport to delegate to the Commission certain rule making power. *But this delegation was strictly limited and defined by the Orders.* It was not a general, all-inclusive delegation of presidential powers to the Commission.

Executive Order 9063 purported to delegate to the Commission only the power to prescribe "special procedures and regulations in connection with the recruitment, placement, and changes in status of personnel . . ." It is clear from the context and purpose of the Order that these were to be merely procedural, and that their purpose was not substantive but expediting: to avoid delay. The entire preamble of the Order reads as follows:

> "Whereas millions of the citizens of this country are engaged in war industries or have been or expect to be called to duty with the armed forces of the United States, which militates against their competing for employment in the Federal service, and greatly diminishes the number of persons available for competitive positions in the Federal service; and
>
> "Whereas it is essential that there be no delay during the present emergency in filling positions in the Federal service with qualified persons;"

It was for this precise and limited purpose that the Commission was authorized:

> "To adopt and prescribe such special procedures and regulations as it may determine to be necessary in connection with the recruitment, placement, and changes in status of personnel for all departments, independent establishments, and other Federal agencies, except positions in the field service of the postal establishment."

Executive Order 9067 may be briefly disposed of. It merely prescribed a special procedure for transfer of personnel and authorized the Commission to carry it out.

The mere reading of these Orders shows that the President did not intend to clothe the Commission with the crucial power to adopt a substantive rule qualifying if not negating statutory guarantees of freedom of political opinion and action, and prescribing a broad test of loyalty.

And, indeed, even if the President had power to delegate to the Commission the function of making incidental procedural or expediting regulations, he certainly had no power to delegate substantive rule-making jurisdiction. In both of the Orders cited, the President purported to act solely under section 2 of the Civil Service Act. But that Act vests the rule-making power exclusively in the President. It gives the Commission no power to prescribe rules. 5 U. S. C. 633. And never since the enactment of the Civil Service Act in 1883 did either a President or a Commission presume that the Act authorized the delegation of substantive rule-making power to the Commission. So we urge that it is clear the President had no authority to delegate rule-making power. And the power he did purport to delegate did not authorize the Commission to adopt substantive rules. Certainly, the Commission had no basis for presuming that the delegation authorized it to introduce a novel and revolutionary type of regulation in the field of freedom of thought.

The issue at this juncture, therefore, comes to this: Assuming that the President had authority to delegate to the Commission some of his functions under the Civil Service Act, just what did he delegate? We submit that it is clear that he at most was authorized to delegate and did in fact delegate merely authority to prescribe "special" or incidental procedural or expediting procedures and regulations so that "there be no delay during the present emergency in filling positions." The Commission was to prescribe "special" procedures. It was not to write a new code. It was not to assume the role of thought police. It was not to leg-

islate a loyalty test for all federal employees (except those in the field service of the postal establishment).

(b) *The Civil Service Act Does Not Authorize Even the President to Prescribe a "Loyalty" Test.*

More than this, even if the President had been authorized to and had purported to vest the Commission with all of his power under the Act, it would still have been unable to prescribe a "loyalty" test. That Act does not itself prescribe such a test, nor does it vest jurisdiction in the President so to do. Its only reference to political opinion is a *prohibition* against using official authority to coerce political action. Section 2, Sixth, 5 U. S. C. § 633. The Act provides in general terms that the President shall issue rules providing for "open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder." The examinations are required to relate to "relative capacity and fitness . . . to discharge the duties of the service . . ." (Section 2, First).

We believe it is clear from the context of the law that "fitness" as used in this provision, refers to qualification for the job in terms of physical and mental qualifications and moral character. It is significant to note that for 59 years the President and the Commission apparently so considered. The Act was passed in 1883 and the first "loyalty" regulation was adopted in 1942. It is also significant that, as we discuss below, Congress acted independently on the subject.

(c) *If it be assumed that there was a delegation to the Commission to prescribe a "loyalty" test, that delegation is invalid for want of proper legislative standard.*

If it were open to the courts in the face of the meaning of the statute and of the administrative and legislative history, to infer that the Civil Service Act or the Orders cited did authorize the prescription of a test of political opinion, we submit that the court should not do so. The investment of an executive agency with power to regulate political

opinion is a serious and dangerous act. It should be done, if at all, only by the deliberate act of Congress after careful debate and subject to meticulous standards set by the Congress. It should not be the product of inference from a word in a statute or regulation. If express delegation of power is required in any field; if a meticulous prescription of standards is anywhere to be required, it should be here: in the sacred, delicate field of free speech and thought and political expression.

We submit that power to legislate or regulate in a field so zealously safeguarded as that of freedom of speech and opinion is not to be attributed to an executive agency except on the basis of clear, specific and unmistakable authority and subject to precise standards. It is not to be assumed, and it is not to be inferred from general language as to recruitment jurisdiction or procedure. And if its existence should be inferred in this case, the power must be held invalid for lack of adequate standards.

The political test prescribed here is a vivid illustration of the vice of an uncontrolled "roving commission" to police political thought. The ground of disqualification adopted was a "reasonable doubt as to loyalty to the Government of the United States." The regulation does not even specify whose "doubt" is required, and the instant case shows the confusion which exists as to this. And the test itself raises a standard so vague and indefinite that into it may be read the individual prejudices of the Commissioners of the Civil Service Commission. The Friedman case graphically shows that the standard is so vague as to mean whatever an administrative agency desires it to mean. For on the identical facts in the identical record Friedman is adjudged loyal by his employing agency and by the Commission's Board of Appeals and Review and his loyalty doubted only by the Civil Service Commissioners themselves.

We respectfully submit, therefore, that there is no basis in law for the Civil Service Commission to legislate a "loyalty" test; and that, in any event, the test prescribed is unconstitutional because it was adopted in the absence of

standards and it is dangerously and fatally vague and general. Free commerce in opinion and political expression are entitled to at least the safeguards provided for free trade in live chickens. Freedom of thought and political expression is entitled to as much protection as the business of slaughtering fowl. *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495. In neither case may "unfettered discretion" be constitutionally exercised.

2. Even if the Civil Service Commission Has Power to Legislate on the Subject of Loyalty and to Require Dismissal, Its Regulation is Invalid in View of Congressional and Constitutional Provisions.

If any inquiry into loyalty by the Civil Service Commission is proper, it should be an inquiry in accordance with congressional standards. Congress has considered the matter of loyalty of employees at great length (see *United States* v. *Lovett,* 66 Sup. Ct. 1073, 1075). As a result it adopted the specific standard contained in the Hatch Act and the Appropriations riders mentioned above, i. e., disqualification of persons advocating the overthrow of the Government or belonging to organizations which advocate such overthrow. From the exhaustive congressional consideration, it is clear that the Congress assumed that it had legislated as far in a field dealing with freedom of speech and opinion as it deemed desirable and that there is no warrant for administrative extension of the congressional standards.

If it should be assumed that the Commission had power to adopt a regulation as to opinion and loyalty qualifications in the absence of clear and explicit statutory language, that regulatory power must be restricted to the prescribing of specifications to the Congressional standard. Yet the Civil Service Commission adopted a regulation going far beyond the congressional standard, and substituting a subjective for the objective congressional test. In doing so it exceeded its powers, and breached the guaranty of the first

amendment to the Constitution and specifically, it violated the guarantees of freedom and speech and opinion granted to Government employees by the Civil Service Act, Section 2 Fifth and Sixth, the Hatch Act, Section 9(a), and the executive order constituting Rule I, Section 2 of the Civil Service Rules. (Supra, p. 6)

3. The Action of the Civil Service Commission Deprives the Appointing Agency of Its Legal Authority Over Its Own Personnel.

The Court below refused to entertain jurisdiction of the matter because of its fear that it would be reviewing "managerial acts" and interfering "with the executive departments in the performance of their ordinary duties." (R. 76). This consideration is, of course, irrelevant if as we contend the Commission was without legal power to take the action that it did. But we have not asked the Court to reverse a "managerial act." What we are asking the Court to do is to permit the War Manpower Commission to perform its managerial acts without interference. The managerial responsibilities were in the War Manpower Commission and, after thorough investigation (R. 32, 33), it exercised those responsibilities by determining that petitioner was loyal and should be retained. It was the Civil Service Commission, having no managerial responsibilities, which interfered with an executive department in the performance of its ordinary duties. We urge not interference with managerial discretion, but an opportunity for free exercise of that discretion and a termination of the disorderly, oppres sive, and unlawful interference of the Civil Service Commission.

Nothing in statute or executive order gives the Civil Service Commission the authority it exercised here. The mere indication by the Civil Service Commission that it is certifying an employee "subject to character investigation" does not deprive the employing agency of its responsibilities for determining whether to retain or dismiss its

employees. Nor can it be held to make the doubts of the Civil Service Commission controlling, against the certainty of the employing agency that the employee is loyal. Not even the Commission's own regulations say that the "doubt" must be that of the Commission instead of the employing agency. The Civil Service Commission's authority to screen appointments cannot be extended to control dismissals of employees not its own without violating the basic principles of our system of executive responsibility. Cf. *Myers* v. *United States*, 272 U. S. 52.

IV.

CONCLUSION.

For the foregoing reasons and for the reasons set forth in the Petition, with which we are in general agreement, we respectfully urge that this Court grant the writ of certiorari.

Respectfully submitted,

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